92-1584

Supreme Court, U.S.
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Case No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOSEPH HOFFMAN,

Petitioner,

vs.

JANICE HARRIS, Personal Representative
of the Estate of Herbert Harris, and
JANICE HARRIS, Individually, and
SCOTT HARRIS and JEFFREY HARRIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

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QUESTION PRESENTED

IS IT AN UNCONSTITUTIONAL "SEIZURE" OF A FELONY SUSPECT WHEN A LAW ENFORCEMENT OFFICER USES DEADLY FORCE DURING THE EXECUTION OF A SEARCH WARRANT AT THAT FELONY SUSPECT'S RESIDENCE TO PREVENT THAT FELONY SUSPECT FROM FLEEING INTO HIS RESIDENCE, IF THAT LAW ENFORCEMENT OFFICER BELIEVES THAT THE FELONY SUSPECT POSES AN IMMINENT RISK OF HARM TO HIMSELF OR OTHERS BECAUSE THAT LAW ENFORCEMENT OFFICER HAS KNOWLEDGE THAT THE FELONY SUSPECT, SIX WEEKS EARLIER DURING THE EXECUTION OF ANOTHER SEARCH WARRANT, DESPITE ORDERS TO HALT, FLED INTO A ROOM WITHIN THE RESIDENCE WHERE FIREARMS WERE CONCEALED?

THE PARTIES

Petitioner, Joseph Hoffman[1]

Defendant (lower court), Nick Navarro, as Sheriff of Broward County[2]

Respondent, Janice Harris, as Personal Representative of the Estate of Herbert Harris and Individually

Respondent, Scott Harris

Respondent, Jeffrey Harris

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[1]Petitioner Hoffman was and is a Deputy Sheriff of the Broward County Sheriff's Office, State of Florida.

[2]Former Sheriff Nick Navarro was succeeded in office by Sheriff Ron Cochran on January 5, 1993

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

The Petitioner, JOSEPH HOFFMAN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Fourth District Court of Appeal for the State of Florida entered in this proceeding on May 13, 1992.

OPINIONS BELOW

The Opinion filed May 13, 1992, issued by the Fourth District Court of Appeal for the State of Florida appears in the Appendix attached hereto. The Order dated July 30, 1992 of the Fourth District Court of Appeal for the State of Florida, denying the Petitioner's Motion for Rehearing and Rehearing En Banc appears in the Appendix attached hereto. The Final Order dated December 30, 1992, issued by the Florida Supreme Court declining to accept jurisdiction over this matter below and ordering that no motion for rehearing will be entertained appears in the Appendix attached hereto.

JURISDICTION

The decision of the Fourth District Court of Appeals for the State of Florida was rendered on May 13, 1992. A timely Motion for Rehearing and Rehearing En Banc was denied on July 30, 1992. A timely Notice to Invoke Discretionary Jurisdiction was filed with the Florida Supreme Court. On December 30, 1992, the Florida Supreme Court issued its Order declining to accept jurisdiction and ordering that no motion for rehearing will be entertained. This Petition for Writ of Certiorari is being timely filed within 90 days of the rendering of that Order. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1257(a).

Question Presented

IS IT AN UNCONSTITUTIONAL "SEIZURE" OF A FELONY SUSPECT WHEN A LAW ENFORCEMENT OFFICER USES DEADLY FORCE DURING THE EXECUTION OF A SEARCH WARRANT AT THAT FELONY SUSPECT'S RESIDENCE TO PREVENT THAT FELONY SUSPECT FROM FLEEING INTO HIS RESIDENCE, IF THAT LAW ENFORCEMENT OFFICER BELIEVES THAT THE FELONY SUSPECT POSES AN IMMINENT RISK OF HARM TO HIMSELF OR OTHERS BECAUSE THAT LAW ENFORCEMENT OFFICER HAS KNOWLEDGE THAT THE FELONY SUSPECT, SIX WEEKS EARLIER DURING THE EXECUTION OF ANOTHER SEARCH WARRANT, DESPITE ORDERS TO HALT, FLED INTO A ROOM WITHIN THE RESIDENCE WHERE FIREARMS WERE CONCEALED?

Constitutional Provisions Involved

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

Statutory Provision Involved

United States Code, Title 42 §1983, Civil Action for

Deprivation of Rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

On March 30, 1987, Plaintiffs/Respondents filed their three-count complaint naming Navarro and Petitioner, Hoffman, as Defendants. That Complaint made the following claims: Count I -Wrongful Death: Negligence; Count II - Wrongful Death: Violation of Civil Rights (Title 42 U.S.C. §1983); Count III - Intentional Infliction of Emotional Distress.

Count II was originally brought against Defendant, Nick Navarro, as Sheriff of Broward County and Petitioner, Joseph Hoffman. Therein Plaintiffs/Respondents alleged that the Petitioner violated Herbert Harris' Fourth and Fourteenth Amendment[3] Rights, when Petitioner Hoffman shot and killed Herbert Harris on November 8, 1985. On October 13, 1987, Petitioner Hoffman and Defendant Navarro filed their Motion to Dismiss Count II of the Complaint for lack of subject matter jurisdiction. The Motion to Dismiss Count II was granted, dismissing the cause as to Petitioner Hoffman and Defendant Navarro in their official capacities. Count II remained in tact

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[3]This reference is to the Fourth and Fourteenth Amendments to the United States Constitution and was the basis of the Plaintiff's 42 U.S.C. §1983 Claim.

against Petitioner Hoffman and Defendant Navarro in their individual capacities. Both Petitioner Hoffman and Defendant Navarro raised qualified immunity as an affirmative defense to this remaining aspect of Count II.[4] Jury trial of this matter began on January 30, 1990 and concluded on February 13, 1990. At the conclusion of the trial, the case was submitted to the jury for deliberation on the issues of negligence and violation of civil rights only,[5] resulting in a jury verdict in favor of Hoffman and Navarro. (See Appendix D)

Plaintiffs/Respondents timely filed a Motion for New Trial on February 21, 1990. Final Judgment was entered on the verdict on March 3, 1990, and the Plaintiffs/Respondents' Motion for New Trial was denied on August 10, 1990. Plaintiffs/Respondents timely appealed to the Fourth District Court of Appeals for the State of Florida on September 7, 1990.

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[4]The Petitioner Hoffman's Motion for Summary Judgment on Counts I and III was denied.

[5]At the time of the submission of the case to the jury, the only remaining aspect of Count II which is the Plaintiff's "civil rights" cause of action predicated upon 42 U.S.C. §1983 as outlined supra, was against the Petitioner Hoffman as an individual. A jury instruction regarding Petitioner Hoffman's use of deadly force involved the application of **Tennessee v. Garner,** 471 U.S. 1 (1985)

Plaintiffs/Respondents' First Point on Appeal as briefed to the Fourth District Court of Appeals was as follows: "Plaintiffs were entitled to a directed verdict on liability where, under no view of the facts, was the deputy sheriff entitled to use deadly force in attempting to search Plaintiffs' home."[6]

The Fourth District Court of Appeals rendered its Opinion dated May 13, 1992 which reversed the jury's verdict in favor of the Petitioner and Defendant and remanded the cause for entry of judgment on liability for the Plaintiffs/Respondents and ordered a new trial on damages only. The Fourth District Court of Appeal's Order reads, in pertinent part, as follows:

> "Viewed in the required light most favorable to the [Defendant/Petitioner] as the jury verdict winners, the record demonstrates as a matter of law that there was no justification for Officer Hoffman's intentional shooting of the decedent, §776.012, 776.05, 933.15 Fla.Stat. (1985), see also **Tennessee v. Garner,** 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)" (See Appendix A)

A Motion for Rehearing and for Rehearing En Banc was filed on behalf of the Petitioner and Defendant. That Motion

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[6]The Petitioner Hoffman and Defendant Navarro timely filed their brief in opposition. Both the Plaintiff/Respondent and Petitioner and Defendant's briefs contained argument regarding Petitioner Hoffman's use of deadly force and the application of **Tennessee,** supra.

was denied by Order of the Fourth District Court of Appeal on July 30, 1992. (See Appendix C) The Petitioner and Defendant timely filed their Notice to Invoke Discretionary Jurisdiction to the Florida Supreme Court on August 31, 1992. On December 30, 1992, the Florida Supreme Court declined to accept jurisdiction and indicated in part that "no Motion for Rehearing will be entertained by the Court . . ." (citation omitted) (See Appendix C)

STATEMENT OF THE FACTS

On November 7, 1985, the Honorable Mark A. Speiser, Circuit Judge in and for the 17th Judicial Circuit, Broward County, Florida, issued a search warrant directed to Detective John Bukata, of the Broward County Sheriff's Office, authorizing and directing search of the Decedent, Herbert Harris' residence. Detective Bukata had applied to Judge Speiser for issuance of the search warrant as the result of a "controlled buy" of $20.00 worth of cocaine, sold by the Decedent Herbert Harris to a confidential informant, Charles Goodman. That narcotics transaction took place in the "fortified shed" located in the backyard of the Harris property. It is that

"controlled buy" by Goodman which provided the factual basis for the issuance of the Speiser search warrant (second search warrant).

On November 8, 1985, Petitioner Hoffman was dispatched by pager notification to go to the Broward Sheriff's Office District III substation to provide assistance in the serving of the Speiser (second) search warrant. Hoffman, who at the time was regularly assigned as a robbery detective, was one of twenty members of the Broward Sheriff's Office S.W.A.T. team. It was at the substation that Hoffman learned that the location at which the Speiser (second) warrant was to be served was the Harris residence. Prior to serving the search warrant, a briefing took place at the Broward Sheriff's Office District III substation. That briefing was given by Detective Bukata, the case agent, and Broward Sheriff's Office Deputy Michael Fraley, who had been called by Petitioner Hoffman to assist in the briefing since Fraley had been involved in the serving of the first search warrant at the Harris residence, approximately six weeks prior on September 21, 1985.

In September of 1985, Detective Fraley was a plain-clothes detective investigating street narcotics offenses. On or about September 21, 1985, he made application to Broward County

Circuit Court Judge Leroy Moe for the issuance of a search warrant for the Harris residence. That warrant was based upon another "controlled buy" of narcotics through an informant other than Goodman. When the first search warrant of September, 1985 was served, numerous persons were present, including the Decedent Herbert Harris, Janice Harris, Scott Harris and Jeffrey Harris, as well as Mr. Goodman.

During the execution of the September 21, 1985 (first) search warrant, Petitioner Hoffman, Deputy Matt Breen and Deputy Frank Imparato were assigned as S.W.A.T. team members to assist the Street Crimes Unit in securing the house and its occupants. During the execution of the first search warrant, Deputy Breen, after initial entry into the Harris residence, was called by the team leader, Sgt. Howard, to assist him in the Harris bedroom where the Decedent Herbert Harris had been observed to flee. The door to the master bedroom was locked and secured, and consequently was kicked down by Sgt. Howard. When entry was made, Harris was observed standing between the bed and the wall, close to the window. At that time, Deputy Breen's weapon was drawn and when the officers entered the bedroom, Harris was ordered to get on the ground. Decedent Harris did not respond and the order was

repeated. Eventually, the Decedent Harris complied, but even after compliance, he continued to move, sliding his hands underneath the bed. While the search was being conducted, located within the Harris bedroom was a fully charged AR-15 semi-automatic rifle with a loaded 30-round clip of ammunition in place.[7] Additionally located in the bedroom was a loaded Remington 870 .12 gauge shotgun. Later, in the "fortified shed" located in the backyard of the Harris residence, a Baretta semi-automatic pistol was located, hidden in a tin can affixed underneath the sink in the bathroom.[8]

The involvement of Petitioner Hoffman in the execution of the search warrant on September 21, 1985 was somewhat unusual and more expansive than is typical. Due to the number of individuals who were at the Harris residence on September 21, 1985, Petitioner Hoffman stayed after other members of the

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[7]The record evidence demonstrates the capabilities of an AR-15 .223 calibre rifle, including the weapon's ability to penetrate concrete block, plywood and steel plate. The record evidence further demonstrates that Petitioner Hoffman was acutely aware of the weapon's capabilities on November 8, 1985 (the second search warrant).

[8]The shed which was utilized by the Decedent Herbert Harris as a location for selling and using drugs was fortified with a two-inch steel door, with two locks, a three-quarter inch bolt on the top and a slotted window.

S.W.A.T team left in order to assist in guarding the occupants of the residence, including Decedent Herbert Harris, **whom Hoffman personally guarded for an hour or longer**.[9] When the weapons were located, Petitioner Hoffman was called into the master bedroom where Hoffman observed the seizure of the weapons.[10]

On November 8, 1985 (Speiser/second search warrant execution date), Petitioner Hoffman realized that the search to be conducted that night was at the same residence as the search conducted six weeks prior and remembering that Det. Fraley was involved in the execution of the first warrant, he called Det. Fraley. Petitioner Hoffman recalled that the briefing on November 8, 1985, consisted of communicating to those who were to be involved in the execution of the warrant relevant information and of events which had occurred during the

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[9]Petitioner Hoffman was dressed in his typical S.W.A.T. uniform during the execution of the first search warrant in September of 1985, as well as during the execution of the second search warrant in November of 1985.

[10]The record evidence reveals that Mr. Harris' behavior in September, 1985 was either observed by Petitioner Hoffman or communicated to Petitioner Hoffman as a part of the briefing prior to the serving of the second search warrant on November 8, 1985.

execution of the first search warrant. There was discussion of the finding of weapons, and photographs taken of the location of the weapons within the Harris bedroom during the execution of the September search warrant were shown. It was further discussed that the Decedent Herbert Harris, during the execution of the September warrant, had fled to the master bedroom which contained the loaded firearms and had thereupon locked the bedroom door, which required forced entry, and that Harris had offered resistance during the search of his residence.

Petitioner Hoffman assumed participation in the November, 1985 assignment would involve high risk because of the weapons which had been located during the execution of the September search warrant. Furthermore, the anxiety level on November 8, 1985, was exacerbated because of the unusual location of the semi-automatic handgun found during the September, 1985 search warrant.[11] Due to the fortification of the shed in the backyard of the Harris residence, it was necessary that the shed and the house be searched

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[11]As indicated supra, a search of the "fortified shed" located in the backyard of the Harris residence revealed a Baretta semi-automatic pistol hidden in a tin can affixed underneath the sink in the bathroom.

simultaneously.

On the night of the execution of the November 8, 1985 (second) search warrant, Petitioner Hoffman was assigned as the "point man". It was his responsibility to locate and secure Mr. Harris so he could not take any action against any law enforcement officers participating in the execution of the search warrant. Petitioner Hoffman, as "point man" walked up the side of the Harris residence and approached the gate to a fence which separated the backyard of the Harris residence from the side yard of the Harris residence. The backyard of the Harris residence was well lit with flood lights. The gate to the fence was locked, although it had not been locked on the execution of the September, 1985 search warrant.

Petitioner Hoffman climbed over the fence, and upon landing, observed the Decedent Herbert Harris standing approximately fifteen feet away, in the vicinity of the fortified shed. Decedent Harris saw Petitioner Hoffman and Petitioner Hoffman believed Harris recognized him. Petitioner Hoffman yelled at Harris to "Hold it," " police," or words to that effect, and the Decedent Harris, virtually instantaneously, turned and ran away from the Petitioner Hoffman at full speed. Petitioner Hoffman ran behind Decedent Harris, trying to catch him.

However, Harris entered the back of the house, running toward the kitchen area, at which time Petitioner Hoffman was beginning to lose sight of Harris. Petitioner Hoffman believed that the Decedent Harris was going to arm himself, as the Decedent was running toward the master bedroom of the home. Petitioner Hoffman had exhausted his options. He had utilized voice commands and tried physical apprehension, neither of which worked. Concerned for his safety, as well as the safety of the remainder of the team, in light of all of his knowledge and experience, Hoffman fired his weapon one time, striking Harris in the lower back. At the time that Petitioner Hoffman shot Decedent Harris, both men were still running. Petitioner Hoffman recalled that Decedent was 8-12' in front of him. The forensic expert who conducted a comparison analysis after test firing Hoffman's weapon determined that the weapon was actually 12 feet from Harris at the instant of the shooting. Mr. Harris was deceased upon arrival of the Broward County Emergency Services paramedic.

ARGUMENT

Reasons for Granting the Writ

1) By determining that there was no justification for the intentional shooting of a fleeing felon under **Tennessee v. Garner,** 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), which determination reversed a jury verdict in favor of the police officer, the Florida appellate court substituted its judgment for that of the police officer and the jury, and has misapprehended or misapplied the standard of analysis and evaluation of use of force.

At the conclusion of trial in this matter, after hearing the evidence and being instructed on the applicable law, the jury specifically determined by its answer to Question No. 3. on the Special Interrogatory Verdict, that Petitioner Hoffman did not deprive the Decedent Harris of his constitutional rights. The Florida appellate court, in reversing the jury verdict, determined as a matter of law that there was no justification for Petitioner Hoffman's use of deadly force, citing **Tennessee,** supra. Implicit in that determination was a rejection of the substantial and competent evidence presented to the jury as to why Petitioner Hoffman used deadly force. The decision of the Florida

appellate court represents a departure from the standard that this Court has established for evaluation of use of force by law enforcement officers.

This Court, in **Tennessee,** supra, made it clear that a police officer's intentional use of deadly force against a person represents a "seizure" of that person within the meaning of the Fourth Amendment to the United States Constitution. See **Tennessee,** supra, at Page 11 No suggestion can be made here that Petitioner Hoffman did not effect a "seizure" when he shot Mr. Harris on November 8, 1985. The issue at all litigation levels is not whether a "seizure" occurred, but whether that "seizure" was objectively reasonable. See **Graham v. Connor,** 490 U.S. 386 (1989). If objectively reasonable, the use of deadly force by Petitioner Hoffman did not violate Mr. Harris' constitutional right to be free from an unreasonable "seizure".

In evaluating whether the use of force or deadly force is constitutional, this Court has previously stated as follows:

> "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make [a seizure]

necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. [T]he question is whether the totality of the circumstances justifie[s] a particular sort of . . . seizure." (citations and internal quotations omitted)

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Fourth Amendment is not violated by an arrest based on probable cause, even thought the wrong person is arrested, nor by the mistaken execution of a valid search warrant on a wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." (citations omitted)

"As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: The question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them,

> without regard to their underlying intent or motivation. (in analyzing the reasonableness of a particular search or seizure, it is imperative that the facts be judged against an objective standard). An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." (internal citations and quotations omitted) **Graham,** supra, at Pages 396,397

The Fourth District Court of Appeal, by its reversal and remand, implicitly rejected the analysis that this Court has required, as enunciated in **Tennessee,** supra and **Graham,** supra. Petitioner Hoffman, as the "point-man" on the S.W.A.T. team was faced with the unenviable task of determining in a matter of seconds what force, if any, should be applied in securing Herbert Harris during execution of the November 8, 1985 (second) search warrant at Mr. Harris' residence.[12] The record reveals that as Petitioner Hoffman entered Mr. Harris' backyard, he (Hoffman) immediately encountered Mr. Harris. Their eyes met for a brief instant. At that instant, Petitioner

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[12]It is clear that the record reveals that Herbert Harris' sale of cocaine to Mr. Goodman provided probable cause for Mr. Harris' arrest, and for issuance of the Speiser (second) search warrant. Consequently, Mr. Harris would have been arrested even if the search of his home failed to uncover additional evidence of criminal activity.

Hoffman believed that Mr. Harris recognized him.[13] Petitioner Hoffman testified that he believed that the Respondents' Decedent recognized him. Under the factual circumstances of this case, said belief was "objectively reasonable." At that exact moment of recognition, Petitioner Hoffman yelled to Mr. Harris, "Hold it," "Police," or words to that effect. Virtually instantaneously to Petitioner Hoffman's command, Mr. Harris ran from Petitioner toward the rear entrance of the Harris residence. Mr. Harris fled despite Petitioner Hoffman's belief that he (Harris) recognized him and heard his command to "hold it."[14] Petitioner Hoffman knew from his involvement in the execution of the first search warrant in September, 1985 and

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[13]The record reveals that Petitioner Hoffman was wearing a S.W.A.T. uniform during the execution of the first search warrant in September of 1985, as well as during execution of the second search warrant in November of 1985. Furthermore, Petitioner Hoffman, while dressed in said uniform, on both occasions personally guarded Mr. Harris and was within Mr. Harris' personal presence for over one hour during the execution of the first search warrant approximately six weeks prior to climbing over the fence surrounding the Harris' property on November 8, 1985.

[14]The record also reveals that Petitioner Hoffman had knowledge that Mr. Harris uses cocaine and consequently it is not unreasonable to assume that he (Harris) could be under the influence of the narcotic at any given time, thereby enhancing any potential threat that he (Harris) may pose.

from the briefing prior to the execution of the second search warrant on November 8, 1985, that Mr. Harris had kept weapons within his home.[15] Furthermore, Petitioner Hoffman knew that Mr. Harris had fled to the master bedroom during the execution of the first search warrant in September, 1985, which is the room in which Mr. Harris kept the loaded AR-15 semi-automatic assault rifle and loaded .12 gauge shotgun.

The record evidence revealed that Mr. Harris had locked and secured the door to the master bedroom after fleeing to the bedroom during the execution of the first search warrant. The door to the master bedroom was forcibly opened by Sgt. Howard. Once opened, Mr. Harris, despite being in the presence of Deputy Breen who had entered the bedroom with his weapon drawn, failed to immediately comply with an order to get on the floor. The record further reveals that Mr. Harris, after repeatedly being ordered to get on the floor by Deputy Breen eventually complied, but continued to move and slide his

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[15]Any suggestion that the fact that the weapons seized in September, 1985, as of November, 1985 were in the custody of the police, somehow means that Mr. Harris' residence would forever remain free of weapons is, of course, a ridiculous assumption, given the access to weapons that people within our society have. Any police officer would be foolish to operate under such an assumption.

hands underneath the bed. The record also clearly establishes that Mr. Harris was prone to hiding weapons on his property in such a fashion so as to enable him (Harris) to obtain possession of any such weapon by "surprise" should the need arise.[16] The evidence is also unquestionably clear that Petitioner Hoffman had possession of all of these facts regarding Mr. Harris, and was forced to contemplate them all in the few seconds Petitioner Hoffman had to act. Petitioner Hoffman attempted to catch Mr. Harris and employed voice commands directing him (Harris) to stop prior to Mr. Harris entering his home. However all of Petitioner Hoffman's efforts to obtain custody over Mr. Harris' person prior to Mr. Harris' entry into the residence failed. Petitioner Hoffman was concerned that if Mr. Harris gained access to the interior of the home that he (Harris) would arm himself once within the home. Petitioner Hoffman was losing sight of Mr. Harris as Mr. Harris ran into the house, thereby forcing Petitioner Hoffman to make an extremely critical decision.

In a matter of seconds, Petitioner Hoffman had to decide

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[16]In fact, the record reveals that Mr. Harris kept a loaded Baretta semi-automatic hidden within a tin can underneath a sink located within a bathroom in the "fortified shed" in the backyard.

and weigh his options, given his knowledge of the facts that he possessed on November 8, 1985. Should he (Hoffman) stop, and retreat back over the fence? What if Mr. Harris has another loaded AR-15 semi-automatic weapon just inside the rear door of the home? Could he (Hoffman) make it back over the fence? Should he (Hoffman) continue the chase into the close confines of the residence, where weapons could be hidden in any number of places unknown to Petitioner, but known to Harris? Why would Harris run if he (Harris) recognized Hoffman? Should he (Hoffman) shoot?

Unlike the factual situation in **Tennessee,** supra, Petitioner Hoffman here did not fire upon an unarmed fleeing felon that he did not feel posed a threat to himself; Petitioner Hoffman testified that his decision to use deadly force was based upon what he perceived as a clear threat to his safety and the safety of other law enforcement officers. Petitioner Hoffman, when he appeared at the Harris residence on November 8, 1985, was aware of the fact that Harris, approximately six weeks prior, when a search warrant was being served at the Harris residence, fled into his bedroom where an AR-15 automatic rifle and shotgun were located. On November 8, 1985, during the briefing held prior to serving the second search warrant, Petitioner

Hoffman was specifically reminded that Harris had refused to obey commands to halt at a point where it was perceived that he was attempting to access one of the weapons ultimately located. Petitioner Hoffman testified that his awareness either from personal observation or as a result of the briefing, combined with Harris' actions on November 8, 1985, made him believe that Harris was again attempting to flee into his home for the purpose of arming himself, and that that behavior posed an immediate risk of harm to him (Hoffman), other law enforcement officers and to the immediate neighborhood. Petitioner Hoffman's factual understanding of the risk posed to him is not in dispute. The question which is properly posed to this Court is whether one can conclude, as matter of law, that the action of Petitioner Hoffman, based upon his knowledge at the time is objectively reasonable. The Florida appellate court apparently was not satisfied with the result of the jury verdict and substituted its judgment for that of Petitioner Hoffman and that of the jury. Petitioner Hoffman would suggest that as a matter of law it cannot be concluded that his decision to use deadly force is not objectively reasonable. It is the contention of Petitioner Hoffman that if the principles enunciated in **Tennessee,** supra and **Graham,** supra are to have any viability,

the action of the Florida appellate court must be reviewed and rejected. The Florida appellate court's opinion represents a deviation from the requirement that analysis of use of force requires a review of the "totality of the circumstances," which this Court has previously imposed as a requirement.

CONCLUSION

A complete review of the record upon which the jury based its verdict demonstrates that Petitioner Hoffman's use of force was "objectively reasonable" as that term has significance and has been previously defined by this Court in **Tennessee,** supra and **Graham,** supra. A reversal by the Florida appellate court of the jury's verdict represents either a misapprehension or misunderstanding of how use of deadly force by law enforcement is to be evaluated.

This Court should grant this Petition for Writ of Certiorari and determine that the shooting of Herbert Harris by Petitioner Hoffman represented a "seizure" which did not violate the Decedent's constitutional rights.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA, FOURTH DISTRICT
JANUARY TERM, 1992

JANICE HARRIS, as Personal Representative of the Estate of HERBERT HARRIS, and JANICE HARRIS, individually, and SCOTT HARRIS and JEFFREY HARRIS,

Appellant,

v.

NICK NAVARRO, as Sheriff of Broward County, and JOSEPH HOFFMAN,

Appellees.

CASE NO. 90-2447

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING AND, IF FILED, DISPOSED OF

Opinion filed May 13, 1992

Appeal from the Circuit Court for Broward County; J. Cail Lee, Judge.

Larry Klein, Jane Kreusler-Walsh and Barbara J. Compiani of Klein & Walsh, P.A., West Palm Beach, and Sheldon J. Schlesinger, P.A., Fort Lauderdale, for appellants.

Bruce W. Jolly of Shailer, Purdy & Jolly, P.A. of Fort Lauderdale, for appellees.

PER CURIAM.

Viewed in the required light most favorable to appellees as the jury verdict winners, the record demonstrates as a matter of law that there was no justification for Officer Hoffman's intentional shooting of the decedent. § 776.012, 776.05, 933.155, Fla. Stat. (1985). See also Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 1985). Accordingly, the judgment below is reversed and the case remanded for entry of judgment on liability for plaintiffs and a new trial on damages.

DOWNEY, LETTS, JJ., and SCHWARTS, ALAN R., Associate Judge, concur.

APPENDIX B

SUPREME COURT OF FLORIDA

WEDNESDAY, DECEMBER 30, 1992

NICK NAVARRO, et al.,	*	
	*	
Petitioners,	*	CASE NO. 80,436
	*	
v.	*	District Court of Appeal,
	*	4th District - No. 90-2447
JANICE HARRIS, etc., et al.,	*	
	*	
Respondents.	*	

* * * * * * * * * * * * * * * * * *

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court.

See Fla. R. App. P. 9.330(d).

OVERTON, McDONALD, SHAW, GRIMES AND KOGAN, JJ., concur

TC

cc: Hon. Marilyn Beuttenmuller, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. J. Cail Lee, Judge
Bruce W. Jolly, Esquire
Larry Klein, Esquire
Sheldon J. Schlesinger, Esquire
Julius F. Parker, Jr., Esquire
Hilliard Moldof, Esquire

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL. 33402

JANICE HARRIS, as Personal Rep., etc.
Appellant(s),

CASE NO. 90-02447

vs.

NICK NAVARRO, as Sheriff of Broward Co., et al.
Appellee(s).

L.T. CASE NO. 87-8621 03 BROWARD

July 30, 1992

BY ORDER OF THE COURT:

ORDERED that appellee's motion filed June 15, 1992, for rehearing and rehearing en banc is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK.

cc: Larry A. Klein
Bruce W. Jolly
Robert W. Kelley

/SR

APPENDIX D

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

JANICE HARRIS as Personal Representative of the Estate of HERBERT HARRIS, and JANICE HARRIS, Individually, and SCOTT HARRIS and JEFFREY HARRIS, Case No. 87-8621-03

Plaintiffs,

v.

NICK NAVARRO, as Sheriff of Broward County and JOSEPH HOFFMAN,

Defendants.

VERDICT

WE, THE JURY, return the following verdict:

1. Was there negligence on the part of the defendant, Joseph Hoffman, which was a legal cause of the death of Herbert Harris?

Yes_____ No_____

Please answer question 2.

2. Was there negligence on the part of the Defendant, Nick Navarro, as Sheriff of Broward County, which was a legal

cause of the death of Herbert Harris?

Yes_____ No_____

Please answer question 3.

3. Did the Defendant, Joseph Hoffman, while acting as a deputy sheriff, deprive Herbert Harris of his constitutional rights, when he shot and killed Herbert Harris at the time of the incident in question?

Yes_____ No_____

If your answer to all questions 1,2, and 3 are No, then your verdict is for the defendants, and you should proceed no further except to date and sign this verdict form and return it to the Courtroom. However, if your answer to any question 1,2, or 3 is yes, please answer question 4.

4. Was there negligence on the part of the decedent, Herbert Harris, which was a legal cause of his own death?

Yes_____ No_____

Please answer question 5.

5. Please state the percentage of any negligence which was the cause of death of Herbert Harris that you charge to:

Joseph Hoffman _____%

Nick Navarro _____%

Herbert Harris _____%

Total must be 100%

Please answer question 6.

6. What is the total amount (100%) of all damages sustained by the family of Herbert Harris caused by the incident in question?

Total Damages of Janice Harris $_____

Total Damages of Jeff Harris $_____

Total Damages of Scott Harris $_____

Please answer question 7.

7. Did the defendant, Joseph Hoffman, act with reckless or callous disregard of, or indifference to, the rights and safety of Herbert Harris in using deadly force at the time this incident occurred?

Yes_____ No_____

If your answer to question 7 is yes, please answer question 8. If your answer to question 7 is no, proceed no further except to date and sign your Verdict and return it to the Courtroom.

8. What is the total amount of punitive damages assessed against the Defendant, Joseph Hoffman?

Total Punitive Damages $_____

SO SAY WE ALL this _____ day of February, 1990.

_____
Foreperson[17]

[17]The jury checked the answer "no" to Questions 1., 2. and 3. The Foreperson then signed and dated the Verdict form.

Supreme Court U.S.
FILED
APR 21 1993
OFFICE OF THE CLERK

No. 92-1584

In The

Supreme Court of the United States

October Term, 1992

JOSEPH HOFFMAN,

Petitioner,

vs.

JANICE HARRIS, Personal Representative of the Estate of Herbert Harris, and JANICE HARRIS, Individually, and SCOTT HARRIS and JEFFREY HARRIS,

Respondents.

On Petition For A Writ Of Certiorari To The Fourth District Court of Appeal For The State Of Florida

BRIEF IN OPPOSITION

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PREFACE

The petitioner was an appellee/defendant in the lower courts and the respondents were the appellants/plaintiffs. The parties will be referred to by name or as plaintiffs and defendant.

The following symbol is used:

A – Petitioner's/defendant's Appendix

STATEMENT OF THE CASE AND FACTS

The plaintiffs cannot agree with the defendant's statement of the case and facts, because it is inaccurate and incomplete. The entire opinion of the Fourth District Court of Appeal is as follows:

PER CURIAM.

> Viewed in the required light most favorable to appellees as the jury verdict winners, the record demonstrates as a matter of law that there was no justification for Officer Hoffman's intentional shooting of the decedent. §§ 776.012, 776.05, 933.15, Fla. Stat. (1985). *See also Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Accordingly, the judgment below is reversed and the cause remanded for entry of judgment on liability for the plaintiffs and new trial on damages. (A 2)

On November 8, 1985, at approximately 6:00 p.m., Herbert Harris was shot in the back with a shotgun and killed, by Deputy Joseph Hoffman of the Broward County Sheriff's Office, as he entered the back door of his home.

Hoffman was at the Harris residence to serve a search warrant. He was dressed in a black uniform with no markings to identify him as a law enforcement officer. It was dark. Hoffman had climbed over a six-foot locked gate in a dark area at the side of the home and had a good view of Mr. Harris who was in the well-lit backyard. Mr. Harris apparently saw Hoffman and ran towards the house with Hoffman following. Hoffman never told Mr. Harris to stop or he would shoot, never told him he was under arrest, and never fired a warning shot. He simply yelled "freeze" or "hold it" and believed he had said, "police". As Mr. Harris entered the back door, Hoffman shot him in the back at a range of 3-4 feet, according to a medical examiner, or 8-12 feet, according to Hoffman and Pat Garland, the firearm's examiner for the sheriff's department. Mr. Harris died at the scene.

SUMMARY OF ARGUMENT

Viewing the facts in a light most favorable to the defendants, the use of deadly force to serve a search warrant was, as a matter of law, unjustified in the present case. The deputy sheriff shot Mr. Harris in the back and killed him, as Mr. Harris was running into his house, and away from the deputy who was in the dark part of the yard and not in uniform. The shooting and killing of Mr. Harris, in order to carry out a search warrant, constituted excessive force as a matter of law. The trial court's denial of the plaintiffs' motion for directed verdict as to liability was error, and the Fourth District correctly reversed.

The brief opinion of the Fourth District presents no conflict, nor does the opinion of the Fourth District affect constitutional officers in any significant manner. The Fourth District merely held that under a particular set of facts, there was no issue for the jury as to whether deadly force was justified. Review should, therefore, be denied.

ARGUMENT

After viewing the evidence in a light most favorable to the defendant, the Florida Appellate Court determined that the record demonstrated, as a matter of law, "no justification for Officer Hoffman's intentional shooting of the decedent" (A 2). It was undisputed that Mr. Harris never threatened anyone with a weapon, he was unarmed, no weapon was visible, and there was no probable cause to believe that he had committed any crime involving serious physical harm. Nor had Mr. Harris threatened harm during the prior search of his residence, referred to by the defendant.

In *Tennessee v. Garner*, 471 U. S. 1, 105 S. Ct. 1694, 1697, 85 L. Ed. 2d 1 (1985), this Court set the standard for the use of deadly force by a police officer:

> This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

In *Tennessee v. Garner, supra,* a police officer shot and killed a burglary suspect. As here, the officer was able to see the suspect's hands, saw no sign of a weapon and, although not certain, was "reasonably sure that he was unarmed." When the officer called out "police, halt," the suspect started to climb over a fence. At that point, the officer shot the suspect in the back of the head. In declaring unconstitutional the Tennessee statute which allowed the use of all means necessary to effect the arrest of a fleeting suspect, this Court made the following relevant observations:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. . . . Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. . . . Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (105 S.Ct. at 1701).

* * *

Nor do we agree with petitioners and appellant that the rule we have adopted requires the

> police to make impossible, split-second evaluations of unknowable facts. We do not deny the practical difficulties of attempting to assess the suspect's dangerousness. However, similar difficult judgments must be made by the police in equally uncertain circumstances.
>
> . . . .
>
> Hymon did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others. (105 S.Ct. at 1705-06).

The situation in this case did not even reach the level of that in *Tennessee v. Garner*. Here, there was no arrest being made. The officers were at the Harris residence simply to execute a search warrant, which implies a mere suspicion of criminal activity of the *premises*. *New York v. P.J. Video, Inc.*, 475 U. S. 868, 106 S Ct. 1610, 89 L. Ed. 2d 871 (1986); *Illinois v. Gates*, 462 U. S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). An arrest, on the contrary, requires knowledge of the activities of the *person* to be arrested and presupposes a better sense of the propensities of that person than would exist at a search warrant stage and which, possibly, could justify a reasonable belief as to the degree of force necessary.

This Court should not exercise its discretion to review this case. The only issue is whether, under this particular factual situation, a sheriff's deputy was entitled to use deadly force in order to carry out a search warrant. The Florida appellate courts properly applied existing law in determining that the defendant's shooting and killing of Mr. Harris, in order to carry out a search warrant, constituted excessive force as a matter of law.

———————♦———————

CONCLUSION

Viewed in a light most favorable to the defendant, the use of deadly force to serve a search warrant was, as a matter of law, unjustified. The Florida appellate court properly reversed the trial court's denial of the plaintiffs' motion for directed verdict on liability based on *Tennessee v. Garner, supra*. The petition for certiorari should be denied.

Respectfully submitted,

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